

STATE OF MICHIGAN
COURT OF APPEALS

MARIETTA A. YANKOVICH,

Plaintiff-Appellee/Cross-Appellant,

v

MARK A. YANKOVICH,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

November 27, 2001

No. 228977

Marquette Circuit Court

Family Division

LC No. 99-035595-DO

Before: Griffin, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals as of right and plaintiff cross appeals from various portions of the parties' July 12, 2000, judgment of divorce entered by the Marquette Circuit Court. We affirm the trial court's property settlement award and the decision not to award temporary spousal support to plaintiff. We likewise affirm the trial court's decision to award plaintiff attorney fees but remand for further findings of fact regarding the appropriate fee.

I

The parties were married on August 29, 1992. Plaintiff, a massage therapist since approximately 1985, ran her own massage therapy business in Indiana prior to meeting defendant. Before the marriage and at its beginning, defendant, an airline maintenance pilot, lived in Michigan, while plaintiff maintained her business in Indiana and commuted to Michigan on a weekly basis. The parties were building a home in Marquette on land defendant had previously acquired with his ex-wife. As a result of an illness caused by carbon monoxide poisoning from a faulty furnace in the couple's new home, plaintiff was forced to close her Indiana business and remain in Michigan. She started another massage therapy business once she had sufficiently recovered from her illness. The couple continued to live in Michigan until their separation in December of 1998. Shortly after the separation, plaintiff sold her massage therapy business and returned to Indiana while defendant remained in the marital home. Plaintiff filed for divorce on February 10, 1999.

Following a hearing, the trial court granted plaintiff a judgment of divorce. Defendant was awarded certain items of personal property as well as the couple's real property, consisting of the marital home and two adjacent lots, subject to a lien on the real property in the amount of \$40,215 for plaintiff's portion of the value of the real and personal property. The trial court also

awarded plaintiff \$4,785 in attorney fees and imposed an additional lien against the real property for this amount. This total award was subject to a deduction for one half of the parties' joint credit card debt of \$18,143, resulting in a total cash award to plaintiff of \$35,928.50. Plaintiff was additionally awarded one half of the "marital portion" of defendant's 401(k) plan through American Eagle Airlines in the amount of \$16,600.84 payable pursuant to a qualified domestic relations order. Although the trial court specifically found the income disparity between defendant and plaintiff to be large, with defendant earning more than \$45,000 in income in 1999 while plaintiff made less than \$5,000, and also found that plaintiff had certain health issues, some of which might possibly require future surgery, plaintiff was awarded no alimony. However, she was awarded the proceeds from the sale of her massage therapy business and the related business accounts. Both parties now challenge various portions of the trial court's property settlement award, while plaintiff additionally challenges the denial of spousal support and defendant challenges the award of attorney fees to plaintiff.

II

Defendant first appeals the trial court's award to plaintiff of one half of the calculated amount of "marital equity" in the marital home and adjacent property allegedly purchased by defendant with premarital funds. We find no clear error in the trial court's factual determination of the amount of the marital equity in these properties.

When deciding whether the trial court erred in awarding property in a divorce action, this Court first reviews the trial court's findings of fact for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997); *Pelton v Pelton*, 167 Mich App 22, 25; 421 NW2d 560 (1988). A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Draggoo, supra*. In reviewing this portion of the trial court's ruling, this Court gives special deference to a trial court's findings when based on the credibility of the witnesses. *Id.*

Marital assets are generally subject to division between the parties while the parties' separate assets may not be invaded. *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997). To this end, assets earned by a spouse during the marriage, whether they are received during the existence of the marriage or after the judgment of divorce, are properly considered part of the marital estate. *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997). Also, while the marital estate includes the appreciation in value of separate assets that the contributing spouse actively managed during the marriage, it does not generally include the appreciation of his or her separate passive investments. *Dart v Dart*, 460 Mich 573, 585; 597 NW2d 82 (1999); *Reeves, supra* at 495.

In making the determination whether to regard an asset as separate property or property subject to division, this Court has stated, "when one significantly assists in the acquisition or growth of a spouse's separate asset, the court may consider the contribution as having a distinct value deserving of compensation." *Reeves, supra* at 495. Therefore, when a spouse contributes premarital property that continues to require further investiture of money or effort after marriage, we have held that the initial contributing spouse is entitled to claim as "separate property" his original down payment, the amount of any equity in the property before the marriage due to the contributing spouse's sole premarital contributions to the property through payments or

improvements made to the property, and any passive market appreciation in the value of the property that occurred before the marriage. See MCL 552.401; *Reeves, supra* at 495-496. The remainder of the premarital equity in the property occurring as a result of the contributions of the other spouse is properly considered to be a marital asset or “marital equity” subject to division, similar to the treatment of equity in that asset occurring after marriage. *Id.* Moreover, a court is permitted to invade a party’s “separate assets” when the other party demonstrates additional need. MCL 552.23; *Reeves, supra* at 494.

In the instant case, the trial court found that the parties had acquired \$20,000 in marital equity in the property that included the marital home. We find this valuation reasonable under the circumstances. The parties do not dispute that the amount of total equity in the home on December 31, 1998, the stipulated valuation date for purposes of property distribution, was \$33,751, equal to the market value of the property minus an outstanding first mortgage balance and the balance of a home equity loan later taken on the property. However, defendant disputes the award of \$13,751 as his share of the premarital equity in the home. He maintains that he invested \$5,000 as a down payment when purchasing the lot with his ex-wife and also paid an additional \$3,500 in monthly payments prior to the parties’ marriage in 1992. He also argues that he made improvements to the garage and a gravel driveway on the lot using his separate funds; the value of these improvements allegedly amounted to \$13,806 and \$5,000, respectively. Defendant contends that these amounts should have been subtracted from the total equity in calculating the divisible marital equity in this property.

Plaintiff, on the other hand, testified at trial that although defendant put a down payment on the lot and made payments on the land contract for the property before the marriage, he only used approximately \$5,000 of his own separate funds to partially complete the improvements prior to the marriage and paid for the bulk of the improvements with the parties’ joint funds, using credit cards taken out in the name of both defendant and plaintiff. Thus, plaintiff argues that the trial court properly refused to credit defendant with the additional amounts used to improve the land that would have reduced the parties’ marital equity in the property.

After thoroughly reviewing the evidence presented by the parties, we find no clear error in the trial court’s decision to believe plaintiff’s testimony over that of defendant, especially in light of the trial court’s determination that defendant’s position of superiority with respect to the parties’ finances and his uncooperative nature during discovery prevented complete disclosure regarding the source of the funds used to pay for the improvements to the marital home lot. The trial court, being in the best position to assess the credibility of the testimony, *Draggoo, supra* at 429, properly could have believed plaintiff’s testimony and found that defendant’s actual premarital contributions to the property consisted of the down payment for the lot, the premarital payments on the land contract and approximately \$5,000 of defendant’s separate funds for the improvements to the garage and driveway. Given this factual finding, the trial court then appropriately held that the remainder of the equity in the house, amounting to approximately \$20,000, was a marital asset subject to division. *Reeves, supra* at 495-496. We thus find no error in the trial court’s award regarding the equity in the marital home property.

We similarly find no error regarding the trial court’s determination of marital equity in an additional piece of real property allegedly purchased by defendant prior to the marriage. Although defendant maintained at trial that he purchased this adjoining property in May 1992, he provided no support for that assertion. Indeed, language on the deed to the property, as well as

plaintiff's testimony, indicated the land was purchased after the marriage. Additionally, plaintiff asserted at trial that defendant could not have used premarital funds for the purchase of that second piece of land due to the couple's financial circumstances at the time of the purchase. Given this factual assertion and the evidence presented, we conclude the trial court did not clearly err in deciding that the purchase of the property was, in fact, made with marital funds and thus find no error in the court's decision to include the entire equity of this property as a marital asset subject to division.

III

Defendant also argues that the trial court erred when it awarded plaintiff \$4,785 in attorney fees. We find no error in the trial court's decision to award fees to plaintiff in the instant case in light of the disparity in the parties' earning capacity and defendant's unreasonable conduct during the course of the litigation. MCL 552.13; MCR 3.206(C); *Stackhouse v Stackhouse*, 193 Mich App 437, 445-446; 484 NW2d 723 (1992). However, the lack of justification from plaintiff or explanation of reasonableness from the trial court regarding the amount of the fees awarded require us to vacate this portion of the trial court's decision and remand to the trial court for further factual findings concerning plaintiff's actual litigation costs and a detailed determination of a reasonable fee award in this case. See *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999); *In re Krueger Estate*, 176 Mich App 241, 249; 438 NW2d 898 (1989).

IV

Plaintiff argues that the trial court erred in refusing to allow the parties to comment orally prior to its modification of the judgment of divorce following defendant's written objections to the proposed judgment. We note that plaintiff neither responded to defendant's written objections nor objected during the final hearing to the trial court's determination that it would consider the issues presented by defendant without further argument. Thus, plaintiff has failed to preserve this issue and has therefore forfeited appellate review absent outcome determinative plain error. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). Except for bare allegations, plaintiff has failed to provide support for her arguments that the trial court acted improperly in considering only the parties' prior testimony and the written submissions in reviewing defendant's objections to the proposed judgment of divorce. We therefore decline to review this issue. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

In a related issue, we likewise find no clear error in the trial court's valuation of the marital portion of defendant's 401(k) plan in light of plaintiff's acquiescence to defendant's proposed valuation of this asset at trial.

V

Plaintiff also asserts that the trial court acted improperly by including an additional amount of \$18,143 of alleged marital credit card debt in calculating the parties' marital assets and liabilities and subtracting one half of this amount from the settlement amount due plaintiff following the property distribution. Although plaintiff testified that this additional debt did not exist, defendant testified otherwise and presented documentation in support of his assertion. We

find no clear error in the trial court's decision to believe defendant's testimony regarding this factual assertion and thus find no basis for reversal regarding this issue. *Draggoo, supra*, at 429.

Likewise, we find no clear error in the trial court's decision to refuse to deduct a disputed \$1,800 from the marital debt, which was alleged by plaintiff to represent a separate gift or loan from defendant to a female acquaintance. Both defendant and the acquaintance testified that such a loan or gift was never made, and the trial court was in a superior position to judge the credibility of this testimony.

VI

Plaintiff also alleges that the trial court erred in refusing to award temporary spousal support to plaintiff. We disagree. This Court reviews the trial court's factual findings relating to the award or modification of spousal support for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000); *Mitchell v Mitchell*, 198 Mich App 393, 396; 499 NW2d 386 (1993). If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts. *Moore, supra*; *Mitchell, supra*. This Court must affirm the trial court's decision as to alimony unless firmly convinced that it was inequitable. *Sparks, supra* at 151-152.

In the instant case, we are not so convinced. The main objective of alimony or temporary spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party, and alimony is to be based on what is just and reasonable under the circumstances of the case. *Moore, supra* at 654. In determining whether alimony is appropriate the trial court should consider a number of factors, including: (1) the past relations and conduct of the parties; (2) the length of the marriage; (3) the abilities of the parties to work; (4) the source and amount of property awarded to the parties; (5) the parties' ages; (6) the abilities of the parties to pay alimony; (7) the present situation of the parties; (8) the needs of the parties; (9) the parties' health; (10) the prior standard of living of the parties and whether either is responsible for the support of others; (11) the contributions of the parties to the joint estate; (12) a party's fault in causing the divorce; (13) the effect of cohabitation on a party's financial status; and (14) general principles of equity. *Ianitelli v Ianitelli*, 199 Mich App 641, 644; 502 NW2d 691 (1993); *Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991).

The trial court herein determined that plaintiff's temporary spousal support needs could be addressed by the property award settlement, a decision we do not find inequitable under the circumstances. The testimony and the exhibits presented at trial indicate that although plaintiff never earned as much as defendant, she was an experienced massage therapist who started two independently owned massage therapy centers and earned a respectable salary running her own massage therapy business in Michigan until its sale in 1999. Plaintiff does not indicate any reason for the sale of this successful business other than her desire to return to Indiana, a relevant factor in determining whether spousal support was proper here. *Moore, supra*; *Healy v Healy*, 175 Mich App 187, 191-192; 437 NW2d 355 (1989). Plaintiff also testified during the hearings below that although she encountered zoning difficulties while establishing a new practice, she had signed a new lease for an office in Indiana and was, in fact, seeing clients in her new business. Additionally, although plaintiff had ongoing medical problems as a result of the carbon monoxide poisoning, she presented no evidence regarding how these conditions would prevent her from continuing to run her business or work as a therapist. Finally, we note that the

trial court did award her the proceeds of the Michigan massage therapy business and the related business accounts in lieu of spousal support or income from 1999.¹ Under these circumstances, we find no abuse of discretion in the trial court's decision not to award temporary spousal support.

VII

Finally, both parties challenge the overall judgment of divorce, each claiming inequities in the judgment. As referenced above, when deciding whether the trial court erred in awarding property in a divorce action, this Court must first review the trial court's findings of fact, which will not be overturned unless clearly erroneous. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990); *Sparks, supra* at 151; *Draggool, supra*. If the trial court's findings of fact are upheld, this Court must then decide de novo whether the dispositive ruling was fair and equitable in light of those facts; however, the trial court's decision should be affirmed unless this Court is convinced that it would have reached a different result had it sat in the trial court's place. *Sparks, supra* at 151-152; *Welling v Welling*, 233 Mich App 708, 709; 592 NW2d 822 (1999). Absent a binding agreement between the parties, the goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. *Byington, supra* at 114. Each spouse need not receive a mathematically equal share; however, a significant departure from congruence must be explained clearly by the court. *Id.* at 114-115. To this end, the trial court should consider the following factors whenever they are relevant to the circumstances of the particular case: (1) the duration of the marriage; (2) the contribution of each party to the marital estate; (3) each party's station in life; (4) each party's earning ability; (5) each party's age, health, and other needs; (6) any fault or past misconduct; and (7) any other equitable circumstances. *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996); *Sparks, supra* at 158-160. The determination of relevant factors will vary with the circumstances of each case, and, while no one factor should be given undue weight, *Sparks, supra* at 159, the weight given to each factor need not be equal. *Welling, supra*.

With the exception of the insufficiently explained attorney fees as referenced above, the overall distribution of the assets and debts of the marriage do not leave this Court convinced that a different result is required in the instant case. Apart from the award of the proceeds of the massage therapy business to plaintiff, it is evident that the trial court attempted to divide the parties' assets and debts equally. Defendant received the real property assets because he remained in the residence in Michigan, yet he was required to reimburse plaintiff for her share of the marital equity found to exist in each asset. We conclude that these findings do not constitute clear error under the circumstances and the resultant division is equitable. Any disparity is

¹ As a corollary, we note that defendant argues the trial court erred in refusing to include plaintiff's Michigan massage therapy business as a marital asset and divide it between the parties. Following a review of the record, we find no support for defendant's assertion that the trial court did, in fact, treat this property as plaintiff's separate property. To the contrary, it appears from the record below that this property was simply awarded to plaintiff in lieu of temporary spousal support. An award of a marital property can be equitable when viewed in light of the entire division of assets and the award, or refusal to award, spousal support. See *Gottschalk v Gottschalk*, 107 Mich App 716, 718; 309 NW2d 711 (1981).

sufficiently explained by the trial court's findings regarding the parties' disparate incomes, plaintiff's lingering illnesses and defendant's lack of cooperation during the course of the proceedings. We therefore affirm the entire judgment of divorce, with the exception of that portion awarding attorney fees. See text, *supra* at section III. After the trial court has determined and supplied adequate justification for a proper fee award to plaintiff, the judgment should be modified accordingly.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Jane E. Markey

/s/ Patrick M. Meter